

3-1-1992

International Extradition: Issues Arising Under the Dual Criminality Requirement

Jonathan O. Hafen

Follow this and additional works at: <https://digitalcommons.law.byu.edu/lawreview>



Part of the [Criminal Law Commons](#), [International Law Commons](#), and the [Jurisdiction Commons](#)

Recommended Citation

Jonathan O. Hafen, *International Extradition: Issues Arising Under the Dual Criminality Requirement*, 1992 BYU L. Rev. 191 (1992).
Available at: <https://digitalcommons.law.byu.edu/lawreview/vol1992/iss1/4>

This Comment is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in BYU Law Review by an authorized editor of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

International Extradition: Issues Arising Under the Dual Criminality Requirement

I. INTRODUCTION

Because of the increase in international drug trafficking, extradition law has become increasingly important in recent years. One of the most fundamental, yet least understood, requirements of extradition is that the offense charged by the State requesting extradition be considered criminal by both the requesting State and the requested State. This is known as the dual criminality requirement.¹ This comment reviews the historical background of the dual criminality requirement, analyzes current problems arising under the requirement, and submits a proposal for change.

II. THE PAST AND PRESENT STATE OF THE DUAL CRIMINALITY REQUIREMENT

The dual criminality requirement has undergone a tremendous change in the last 100 years. In the late nineteenth century the requirement was intended to force a requested State to justify its denial of an extradition request in order to protect the individual facing extradition from unjust prosecution. However, in this century dual criminality has become an unwanted barrier to extradition to both requesting and requested States. In order to relegate this barrier to a background position in the extradition process, courts are recognizing ever-expanding scenarios in which the elements of the requirement may be satisfied. Similarly, parties who negotiate treaties, especially in the last ten years, have made it clear that the dual criminality requirement is to be a barrier to extradition only when the requested State so desires. The liberalization of the dual criminality requirement—especially by the twentieth century Unit-

1. SATYA D. BEDI, *EXTRADITION IN INTERNATIONAL LAW AND PRACTICE* 179 (1968) ("This rule of double criminality is one of the most essential ingredients in the proceedings for extradition of the fugitives who have taken refuge in the territory of the requested state and are apprehended therein."). Dual criminality is also referred to as "double criminality." For consistency's sake, I will refer to it as "dual criminality." However, if a source refers to the principle as "double criminality," it will not be altered.

ed States' court system—is best understood in light of the changing political contexts in which the requirement has been invoked. This comment explores these shifting political winds and analyzes the judicial response to the increased desire for a weaker dual criminality requirement.

A. *The Historical Context of the Dual Criminality Requirement*

Extradition in various forms has existed for thousands of years.² The earliest recorded extradition provision is found in the 1280 B.C. peace treaty between the Egyptian Pharaoh, Rameses II, and the Hittite Prince, Hattulisi III.³ Professor Shearer points out that "[t]reaties including provision for the surrender of criminals are recorded in succeeding eras of history, but the actual extent to which regular surrender of common criminals was conducted before the eighteenth century A.D. is a matter of some controversy."⁴

From the beginning of its use, extradition has been largely a foreign relations tool, intended to foster goodwill among neighboring nations. Professor Bassiouni, perhaps the greatest living authority on international extradition, stated the following about the relationship between extradition and foreign relations:

Because the requested and requesting participants are states it is clear that there is a nexus between the interests of those respective states and the granting or denial of extradition. In fact, the whole history of extradition has been little more than a reflection of the political relations between the states in question. This explains why whenever a state main-

2. M. CHERIF BASSIOUNI, *INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER* 1 (1974). Professor Bassiouni reported that "[t]he practice originated in earlier non-Western civilizations such as the Egyptian, Chinese, Chaldean, and Assyro-Babylonian civilizations." *Id.* (citing Luis Kutner, *World Habeas Corpus and International Extradition*, 41 U. DET. L.J. 525 (1964)).

3. IVAN A. SHEARER, *EXTRADITION IN INTERNATIONAL LAW* 5 (1971).

4. *Id.* This controversy concerns whether extradition requests focused only on political offenders or if they included common criminals as well. Scholars have postulated that early extradition was limited to political offenders. See, e.g., EDWARD CLARKE, *A TREATISE UPON THE LAW OF EXTRADITION* 18-22 (4th ed. 1903). However, more recent academic efforts show that there were a large number of early extradition requests for fugitives from common crimes as well as political offenses. See, e.g., Paul O'Higgins, *The History of Extradition in British Practice*, 13 INDIAN Y.B. INT'L AFF. 78-115 (1964).

tained in its relations with another state a certain degree of formality, extradition was bound in solemn formulas and treaties, but whenever relations between the interested states were informal other informal modes of rendition were resorted to as a sign of cordial cooperation.⁵

Such political concerns have remained a primary motivation behind extradition. However, there are some major differences between extradition in ancient times and modern extradition. As international communication and awareness increased, many nations became concerned about the treatment of extradited individuals. Preservation of fundamental human rights of the fugitive became an important factor for many nations considering extradition requests. Because each nation had different standards concerning the treatment of criminals, a complex web of procedural requirements surrounding modern extradition arose to ensure that a fugitive would not be prosecuted for an act not considered criminal by both nations or for acts not falling within the scope of the extradition treaty. These requirements began blooming in the late eighteenth century and continued to develop throughout the nineteenth century.⁶

Because the welfare of the individual facing extradition was the foundation of this procedural proliferation, protecting the individual's rights became a customary practice. Professor Bassiouni commented that "[t]he emergence of humanitarian international law gave rise to a new legal status to one of the participants, i.e., the individual, thus, placing some limitations on the power of the respective sovereigns."⁷ Therefore, the procedural prerequisites to granting extradition gradually achieved the status of international law.

Perhaps the most significant prerequisite that took shape during the nineteenth century, and continues to exist today, is

5. BASSIOUNI, *supra* note 2, at 3.

6. SHEARER, *supra* note 3, at 13-16.

7. BASSIOUNI, *supra* note 2, at 2. "Humanitarian international law" refers to a growing collection of international laws designed to protect universally recognized human rights. An example of such a right is freedom from torture. For other examples and a more detailed discussion of this body of law, see JOSEPH M. SWEENEY ET AL., *CASES AND MATERIALS ON THE INTERNATIONAL LEGAL SYSTEM* 579-732 (3d ed. 1988); see also BEDI, *supra* note 1, at 69 ("[T]he liberty of an individual is not something which can be disposed of indiscriminately in the absence of a positive law; therefore, a state cannot detain or apprehend the person sought for extradition unless the evidence submitted by the requesting state justifies *prima facie* judicial proceedings against the accused.") (citation omitted).

the dual criminality doctrine. Dual criminality prevents extradition of an individual unless the requesting State can show that the individual committed an act which constituted a "crime according to the laws of both the requesting and the requested States."⁸ The dual criminality requirement in United States extradition jurisprudence has its roots in the Jay Treaty of 1794. This treaty concerned extradition requests between the United States and Great Britain, but its provisions were substantially adopted in other treaties.⁹ The standardization of dual criminality began with Britain's Extradition Act of 1870. Following the adoption of this statute, many other nations passed legislation patterned after the British statute.¹⁰ Today, some form of the dual criminality requirement is found in nearly all bilateral and multilateral extradition treaties.¹¹

The almost universal recognition of dual criminality has made it a well-settled part of customary international law.¹² Therefore, any State wishing to request extradition must indicate compliance with the dual criminality requirement. The requested State bears the burden of ascertaining whether the conduct considered criminal in the requesting State is also criminal in the requested State.¹³

In addition to protecting a fugitive from unjust punishment, the dual criminality requirement serves other important purposes:

[T]he double criminality rule serves the most important function of ensuring that a person's liberty is not restricted as a consequence of offences not recognized as criminal by the requested State. The social conscience of a State is also not embarrassed by an obligation to extradite a person who would not, according to its own standards, be guilty of acts deserving punishment. So far as the reciprocity principle is con-

8. SHEARER, *supra* note 3, at 137.

9. See *Brauch v. Raiche*, 618 F.2d 843, 847 (1st Cir. 1980) ("The requirement that the acts alleged be criminal in both jurisdictions is central to extradition law and has been embodied either explicitly or implicitly in all prior extradition treaties between the United States and Great Britain since the Jay Treaty of 1794.").

10. SHEARER, *supra* note 3, at 15.

11. M. CHERIF BASSIOUNI, *INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE* 326-27 (2d ed. 1987).

12. *Id.*

13. In the United States, the federal district courts generally have the burden of answering this question.

cerned, the rule ensures that a State is not required to extradite categories of offenders for which it, in return, would never have occasion to make demand. The point is by no means an academic one even in these days of growing uniformity of standards¹⁴

The ability of the dual criminality requirement to serve these purposes may depend on the form it is given in the applicable extradition treaty. Some treaties and laws add certain embellishments to the dual criminality requirement which expand or limit the scope of the doctrine. For example, a treaty or law may require that the conduct of the individual facing extradition be not only criminal, but also rise to the level of a serious crime.¹⁵ Other treaties and laws require a showing that the conduct constitutes an extraditable crime, i.e., a crime which is listed in the treaty as one justifying extradition.¹⁶ Obviously, a firm grasp on all of the possible dual criminality subtleties may be difficult to obtain.

With the wide variety of possible dual criminality requirements, generalization is difficult. Nevertheless, Whiteman made the following attempt:

A common requirement for extradition is that the acts which form the basis for the extradition request constitute a crime

14. SHEARER, *supra* note 3, at 137-38.

15. The "seriousness" of a crime is often determined by the minimum sentence which a person could receive if convicted of the crime. *See, e.g.*, Treaty between the United States of America and the Federal Republic of Germany Concerning Extradition, June 20, 1978, U.S.—F.R.G., art. II, ¶ 2, 32 U.S.T. 1485, 1489-90 (mandating that extradition is possible only if (a) "the offense is punishable under the laws of both Contracting Parties by deprivation of liberty for a maximum period exceeding one year, or (b) the enforcement of a penalty or a detention order, if the duration of the penalty or the detention order still to be served, or when, in the aggregate, several such penalties or detention orders still to be served, amount to at least six months.").

16. This requirement is a correlary of dual criminality, but is handled separately by most courts. *See, e.g.*, *United States v. Herbage*, 850 F.2d 1463, 1465 (11th Cir. 1988) (showing that extraditable offense and dual criminality requirements are treated separately), *cert. denied*, 489 U.S. 1027 (1989); *Emami v. United States*, 834 F.2d 1444, 1449 (9th Cir. 1987); *In re Extradition of Rabelbauer*, 638 F. Supp. 1085, 1087 (S.D.N.Y. 1986). The doctrines interrelate because under many extradition treaties the offense must be considered extraditable by both nations in order to fully satisfy the dual criminality requirement. *Caplan v. Vokes*, 649 F.2d 1336, 1343 (9th Cir. 1981) ("[N]o offense is extraditable unless it is criminal in both jurisdictions."); *Emami*, 834 F.2d at 1449 (citing *Caplan* for the principle that the offense must be extraditable in both jurisdictions in order for dual criminality to be satisfied).

under the law of both the requesting and the requested States. This requirement exists whether the request is made under a treaty or apart from a treaty and whether a list of offenses or a minimum-penalty provision is involved. In the case of a treaty or a law providing for extradition for offenses punishable by at least a certain minimum penalty, specific provision is usually made that the offense must be a crime in both States. Where a list of offenses involved is in the treaty or the law, a specific provision on the point is less common. However, even in the absence of a specific provision, the requirement is generally imposed. The question whether the requirement has been met generally arises with regard to the law of the requested State, and where the requirement is covered by a specific provision in the law or treaty it is often cast only in terms of the law of the requested State, since, if a State requests extradition, it must base its request on an alleged violation of its law. It might be supposed that if two States agree, in a treaty, to a list of offenses for which extradition shall take place, they would include only those acts which are crimes in both States. However, questions nevertheless may arise. Certain acts may, under the law of the requesting State, constitute a listed treaty offense while, under the law of the requested State, the same acts may constitute no crime or, more frequently, one not listed in the treaty.¹⁷

Needless to say, courts in this country and elsewhere have had a difficult time determining the scope of the dual criminality requirement. Despite the confusion, a clear trend toward a more permissive reading of the requirement has taken place throughout the course of this century. Courts began to defer to executive decisions regarding the desirability of extradition,

17. MARJORIE M. WHITEMAN, 6 DIGEST OF INTERNATIONAL LAW 773-74 (1968), *quoted in* BASSIOUNI, *supra* note 11, at 330. Professor Shearer argues that dual criminality is no longer dual criminality but is dual extraditability. This argument is based on the notion that dual criminality no longer requires simply that the offense be criminal in both countries, but also that the offense be listed in the respective treaty as an extraditable offense fitting a set list of requirements—such as that the offense is a serious crime or is on a list of extraditable crimes found within the treaty. SHEARER, *supra* note 3, at 138. This would explain the significant overlap between the two fundamental extradition requirements of dual criminality and an extraditable offense. The extraditable offense requirement is beyond the scope of this paper, although Professor Whiteman appears to try to disentangle the two requirements in the excerpt above.

due both to the increasing complexity of ascertaining violations of two nations' laws and judicial recognition of the executive's role in establishing foreign policy. More recently, the increase in international crimes such as drug trafficking and terrorism have added a new urgency to allowing extradition whenever possible.

Even so, the dual criminality requirement continues to present a potential obstacle to both requesting and requested states, even when both nations support a decision to extradite. Because resources are more accommodating to a study of how and why United States courts have liberalized the interpretation of the requirement—and because a worldwide survey would be impossible—what follows is an analysis of the major dual criminality decisions in the United States since the turn of the century.¹⁸

B. The Liberalization of the Dual Criminality Requirement

During the nineteenth century, United States courts developed a substantial body of extradition jurisprudence.¹⁹ During that time, American courts determined compliance with the dual criminality requirement by attempting to ascertain whether the offense constituted a crime under the laws of the requesting State as well as the requested State. Such a process worked well at the time. As one late nineteenth century commentator, Sir Edward Clarke, noted in 1874:

In the matter of extradition, the American law was, until 1870, better than that of any country in the world; and the decisions of the American judges are the best existing expositions of the duty of extradition, in its relations at once to the judicial rights of nations and the general interests of the civilisation [sic] of the world.²⁰

But as criminal codes in other countries grew more complex, United States courts began having a difficult time determining

18. These are extradition decisions in which the United States is the requested State, and some other nation is the requesting State. These decisions are the focus of commentary and the foundation for nearly all recent decisions regarding dual criminality.

19. SHEARER, *supra* note 3, at 16.

20. EDWARD CLARKE, A TREATISE UPON THE LAW OF EXTRADITION 28-29 (2d ed. 1874), *quoted in* SHEARER, *supra* note 3, at 16.

whether conduct was criminal in foreign jurisdictions.²¹ Professor Shearer remarked that because judges were often totally unfamiliar with the practices and traditions of foreign jurisprudence, it quickly became apparent that attempting to engage in a process of comparative criminal law was "an uncertain judicial voyage" on which United States courts were "ill-equipped to embark."²² Other courts around the world faced similar difficulties.²³

As courts began to recognize these difficulties, the strictly comparative interpretation began to give way to looser interpretations of the dual criminality requirement. A series of United States Supreme Court decisions during the first half of this century reflects this new standard.²⁴ Consequently, some United States courts now virtually assume that the offense constitutes a crime in foreign jurisdictions and focus instead on whether the conduct constitutes a crime under United States law.²⁵ This is but one aspect of the liberalization of the dual

21. John G. Kester, *Some Myths of United States Extradition Law*, 76 GEO. L.J. 1441, 1460 (1988).

22. SHEARER, *supra* note 3, at 139; *see also* Kester, *supra* note 21, at 1460 ("Most United States judges and attorneys . . . have no expertise in comparative law, particularly in its esoteric subcategory of comparative criminal law Our courts usually are not comfortable with what appear to be overly refined arguments that seek to distinguish between the elements of United States crimes and their foreign counterparts.").

23. Dual criminality was especially problematic for foreign courts considering U.S. extradition requests because the U.S. requests were often based on complex criminal statutes such as RICO and CCE. These statutes are uniquely American, having no foreign counterparts. Thus, a strict interpretation of the dual criminality requirement by foreign courts would make extradition impossible even when public policy dictated a contrary result. *See infra* notes 67-89 and accompanying text. Courts in the United States have faced similar problems when considering other nations' drug and terrorism prevention legislation.

24. *See infra* notes 29-44 and accompanying text.

25. For example, the Tenth Circuit stated:

While on its face the doctrine of dual criminality seems to require a full-blown inquiry into both the question of whether the alleged acts would violate American law *and* the question of whether the alleged acts constitute a violation of the British statutes, we think that an extensive investigation of British law would be inappropriate. For one thing, we "are not expected to become experts in the laws of foreign nations."

Peters v. Egnor, 888 F.2d 713, 716 (10th Cir. 1989) (citations omitted). For an extreme example of a court all but ignoring the dual criminality requirement, *see* *United States v. Deaton*, 448 F. Supp. 532 (N.D. Ohio 1978) (After looking at the purposes of the dual criminality requirement, and finding that the conduct constituted a crime under United States law, the court decided that it was "unnecessary to look for a counterpart in the criminal law of West Germany."). *Id.* at 536, *aff'd*,

criminality requirement, but it signifies the twentieth century trend toward the deferential *in abstracto* method of dual criminality interpretation rather than the more probing inquiries of the traditional *in concreto* method. Clearly the policy underlying this change is the desire to rebalance the individual rights of the accused in light of a worldwide effort to suppress international crimes. A review of this shift in methodology, and the United States Supreme Court decisions underlying the change, follows.

1. *In concreto and in abstracto methods of interpreting the dual criminality requirement*

The most significant liberalization of dual criminality in the United States concerned the method used to apply the dual criminality requirement to the facts of a specific case. Historically, two different approaches have been used to interpret the requirement: *in concreto* or *in abstracto*. Under the *in concreto* method, the courts rely on the label of the domestic crime and apply a strict analysis of its elements to the parallel law of the requesting State. If the laws match, the court then applies the domestic law to the actions of the party facing extradition.²⁶ In other words, if the crime for which the requesting State wishes to prosecute does not have an exact domestic corollary—including identical elements—then the request for extradition will be turned down.

A court applying the *in abstracto* standard, by contrast, reviews the criminality of the conduct regardless of the label and

597 F.2d 769 (5th Cir. 1979). Kester cited this case as a "particularly egregious example of a court ignoring the requirement of dual criminality." Kester, *supra* note 21, at 1460.

Some foreign courts have liberalized the dual criminality requirement by asking not whether the conduct is an offense under laws of the requested State, but instead whether the conduct is an offense under the laws of the requesting State. See, e.g., *United States v. Link & Green*, 21 I.L.R. 234 (Que. 1954). In this case the Supreme Court of Quebec granted the request of the United States to extradite two fugitives fleeing Michigan indictments on charges of forgery and obtaining money by false pretenses. Professor Bassiouni commented that the "unusual feature of this case is that the issue was not whether the offense charged constituted . . . an offense in the requested state but whether it was an offense under the laws of the requesting state." BASSIOUNI, *supra* note 2, at 345.

26. S.Z. Feller, *The Significance of the Requirement of Double Criminality in the Law of Extradition*, 10 ISR. L. REV. 51, 66-76 (1975) (providing a general discussion of the concepts of *in abstracto* and *in concreto* interpretation of the dual criminality requirement).

elements of the alleged crime.²⁷ Under this standard, the conduct must simply be criminal in both jurisdictions; no parallel offense is required. Although United States courts adhered to the *in concreto* interpretation prior to the turn of the century, since that time the United States has become a solidly *in abstracto* jurisdiction.²⁸

The first case which signalled the United States' shift from one interpretational extreme toward the other was *Wright v. Henkel*.²⁹ *Wright* involved a request by the British government to extradite a man who had participated in a fraudulent scheme in England and then fled to New York. The extraditable offense listed in the treaty was fraud. The problem arose from the fact that the elements for a *prima facie* case of fraud differed in the two jurisdictions, raising dual criminality concerns. The elements of the English version of the crime differed only slightly from a similar New York provision. Nevertheless, the defendant, Wright, claimed that his extradition was precluded by the dual criminality requirement. In rejecting Wright's claim, the Court noted that the elements of the British and United States version of the crime were different but held that because the two were "substantially analogous," the dual criminality requirement had been satisfied.³⁰

The next major case addressing the dual criminality requirement was *Collins v. Loisel*.³¹ Rather than reining in the expansive reading of the dual criminality requirement taken by the Court in *Wright*, the *Collins* Court continued the trend. In *Collins*, the defendant allegedly made a promise he never intended to keep in exchange for a pearl button. The British crime for such action was known as cheating, while the analogous U.S. crime was obtaining property by false pretenses. Collins argued that cheating was not among the offenses listed as extraditable in the treaty between the U.S. and Great Britain and that the crime of cheating was a different offense than obtaining property by false pretenses.³² Specifically he claimed that "to convict of cheating it is sufficient to prove a promise of future performance which the promisor does not intend to per-

27. BASSIOUNI, *supra* note 2, at 322.

28. See *infra* notes 36-40 and accompanying text.

29. 190 U.S. 40 (1903).

30. *Id.* at 58.

31. 259 U.S. 309 (1922).

32. *Id.* at 311.

form, while to convict of obtaining property by false pretense it is essential that there be a false representation of a state of things past or present."³³ In response to this argument, the Court held that

[t]he law does not require that the name by which the crime is described in the two countries shall be the same; nor that the scope of the liability shall be coextensive, or, in other respects, the same in the two countries. It is enough if the particular act charged is criminal in both jurisdictions.³⁴

This language altered the *Wright* test by no longer requiring that the two versions of the alleged crime be substantially analogous. Instead, the conduct simply had to be considered criminal under any state or federal law in both jurisdictions. Although this case represents an extension of the requesting State's powers to extradite, it arguably comports with a common sense interpretation of the dual criminality doctrine. If the dual criminality doctrine means what its title suggests, then evidence that the conduct is criminal in both jurisdictions should be enough to assure the requested State that extradition is justified. However, there is a potential problem with this approach. If the requesting State has a very low standard of proof with a very high penalty for conviction when compared with the standards and penalties of the requested State, the rights of the individual may be in jeopardy.³⁵ Nevertheless, the policies underlying the trend toward liberalization favor the needs of nations rather than individuals. Thus, this concern did not trouble the Court in *Wright*.

The next step in liberalizing the judicial interpretation of the dual criminality requirement was taken in *Factor v. Laubenheimer*.³⁶ Like *Wright* and *Collins*, *Factor* involved an extradition request from Great Britain. The defendant in *Factor* allegedly had committed the British crime of receiving stolen property. In an incredibly broad reading of the dual criminality requirement, the Court held that even though the asylum state of Illinois did not consider the defendant's conduct

33. *Id.*

34. *Id.* at 312.

35. For a discussion of potential problems caused by different standards of criminal procedure and punishment, see *Shapiro v. Ferrandina*, 478 F.2d 894, 908-09 (2d Cir.), *cert. dismissed*, 414 U.S. 884 (1973).

36. 290 U.S. 276 (1933).

criminal, the dual criminality requirement was nevertheless satisfied because the conduct constituted a crime under the laws of the majority of other states. The Court also stated that treaties should be liberally applied to effectuate the intent of the parties. Therefore, because the dual criminality requirement was not specifically stated in the treaty between the United States and Great Britain, the Court reasoned that the requirement should not act as a barrier to extradition. Bassiouni correctly notes that the Treaty actually did contain the dual criminality requirement, but the specific extraditable offense at issue in the case did not restate the requirement. Because of this, the Court determined that while the dual criminality requirement may apply to some parts of the Treaty, it did not apply to the offense in *Factor*.³⁷

If the Court simply wished to permit the extradition request, it could have taken an easier path. For example, as Justice Butler noted in his dissent, the conduct engaged in by the defendant could have been construed as criminal under several provisions of Illinois law:

[T]he record shows [that the defendant] was a party to the fraud by which the money was obtained, and that, as obtaining by false pretenses and participation in that offense are both criminal in Illinois and extraditable, it must be held that that extradition of the petitioner would be within the rule. The court [sic] does not take that point, and therefore it need not be considered here. It is mentioned for the purpose of disclosing the principal, if not indeed the sole, ground upon which extradition is now claimed.³⁸

Because the defendant's conduct would have been considered criminal under the laws of both jurisdictions, the test proclaimed in *Collins* would have been met.³⁹ But rather than staying with the previously articulated standard, the Court instead chose to open up new ground, expanding the dual criminality test almost beyond recognition. The Court justified itself by

37. BASSIOUNI, *supra* note 11, at 338. What *Factor* in effect required was that the treaty contain the dual criminality requirement provision within each listed extraditable offense in order for that requirement to preclude extradition. By so doing, the Court ignored the previous precedent which had held that the dual criminality requirement was a part of customary international law and therefore implicit throughout all treaties. See *id.* at 327, 338.

38. *Factor*, 290 U.S. at 308, quoted by SHEARER, *supra* note 3, at 145.

39. See *supra* note 34 and accompanying text.

stating:

The obligation to do what some nations have done voluntarily, in the interest of justice and friendly international relationships . . . should be construed more liberally than a criminal statute or the technical requirements of criminal procedure It has been the policy of our own government, as of others, in entering into extradition treaties, to name as treaty offenses only those generally recognized as criminal by the laws in force within its own territory. But that policy when carried into effect by treaty designation of offenses with respect to which extradition is to be granted, affords no adequate basis for declining to construe the treaty in accordance with its language, or for saying that its obligation, in the absence of some express requirement, is conditioned on the criminality of the offense charged according to the laws of the particular place of asylum.⁴⁰

From this statement, one can discern that the Court found that the policies behind interpreting treaties broadly outweigh those supporting a strict application of the dual criminality requirement.

As pointed out by Professor Bassiouni, the problem with an approach as broad as *Factor's* is that it in essence ignores dual criminality altogether: "[*Factor*] illustrates . . . that a broad [*in abstracto*] interpretation of . . . double criminality leads to the same result as its nonapplicability when it is coupled with a broad interpretation of what constitutes the requirement of extraditable offenses."⁴¹ However, if the policy goal underlying the modern dual criminality requirement is to strike a new balance between individual rights and the worldwide effort to combat international crime, then the *Factor* approach may give courts the necessary latitude to weigh and balance each of these important interests.

Some lower courts have since rejected the *Factor* interpretation as overly broad and have instead looked to the *Collins* standard which requires that the particular acts must simply be criminal in both jurisdictions.⁴² Other courts cite *Factor* as

40. 290 U.S. at 298-300 (citations omitted), quoted in BASSIOUNI, *supra* note 11, at 338.

41. BASSIOUNI, *supra* note 11, at 339.

42. Because *Factor* did not explicitly overrule *Collins*, some lower courts have chosen to apply *Collins* without even acknowledging *Factor*. See, e.g., United States

authority for the principle that treaties should be construed liberally but rely on *Wright* and *Collins* for dual criminality precedent.⁴³ Some lower courts have even returned exclusively to the *Wright* standard, which requires that the codification of the conduct as a crime in the two jurisdictions be "substantially analogous."⁴⁴

2. *Liberalization through choice of law*

Choice of law issues have also troubled courts seeking to interpret the dual criminality requirement. This area is particularly difficult for U.S. courts because of the almost unique way in which the United States has bifurcated its criminal law system. Whereas most nations have a single criminal code, early concerns regarding the allocation of power in the United States led to the development of different criminal codes in each state as well as a body of federal criminal law.⁴⁵ Because dual criminality requires that the offense be criminal under the laws of both the requesting and the requested *States*, the question arises whether this means federal law or state law, or both. Part of the problem is that many bilateral extradition treaties entered into by the United States contain language mandating that the conduct must be considered criminal by both *contracting parties*. Because individual states cannot contract with another nation, they are clearly not a contracting party.⁴⁶ Ostensibly then, state law should not apply. But be-

v. *Sensi*, 879 F.2d 888 (D.C. Cir. 1989); *United States v. Van Cauwenberghe*, 827 F.2d 424 (9th Cir. 1987), *cert. denied*, 484 U.S. 1042 (1988); *United States ex rel. Rauch v. Stockinger*, 269 F.2d 681 (2d Cir.), *cert. denied*, 361 U.S. 913 (1959), *reh'g denied*, 361 U.S. 973 (1960). *But see* *United States v. Deaton*, 448 F. Supp. 532, 536 (N.D. Ohio 1978) (following the *Factor* analysis), *aff'd*, 597 F.2d 769 (5th Cir. 1979).

43. *See, e.g.*, *Peters v. Egnor*, 888 F.2d 713, 719 (10th Cir. 1989); *In re Sindona*, 584 F. Supp. 1437, 1447 (E.D.N.Y. 1984).

44. *See, e.g.*, *Brauch v. Raiche*, 618 F.2d 843, 851 (1st Cir. 1980) ("Although we do not accept appellant's argument that strict congruity of offenses is necessary to meet the test of double criminality, we agree that the offenses of the two countries must be substantially analogous."); *see also* *Oen Yin-Choy v. Robinson*, 858 F.2d 1400, 1404-05 (9th Cir. 1988) (adopting *Wright's* "substantially analogous" standard), *cert. denied*, 490 U.S. 1106 (1989); *Russell v. United States*, 789 F.2d 801, 803 (9th Cir. 1986).

45. Federalism, however, is not the sole source of the diverse bodies of United States criminal law. Other nations, such as Germany, also have one national government along with separate governments for each state, but have only one national criminal code.

46. *Sindona*, 584 F. Supp. at 1447.

cause so many common crimes under state law and the law of foreign States have no U.S. federal counterpart, it would be very difficult for the dual criminality requirement ever to be met. United States courts have recognized this,⁴⁷ and although divided on the question, most courts heed *Factor's* ghost and follow the trend toward a permissive reading of the dual criminal requirement allowing federal or state law to apply.⁴⁸

As it loosened the general interpretation of the dual criminality requirement, the *Wright-Collins-Factor* line of cases also liberalized the choice of law question. In *Wright*, the United States Supreme Court addressed the question of whether conduct could be considered criminal under the laws of the asylum state when there was no federal law prohibiting the conduct. The Court determined that the language of the treaty should be interpreted broadly to allow state as well as federal law to be invoked in order to meet the requirement.⁴⁹ Similarly, in *Collins* the Supreme Court held that criminality in the requested State could be shown through state law.⁵⁰ The *Factor* decision,⁵¹ in addition to expanding the ways in which the dual

47. See, e.g., *id.* ("Although Article II of the Treaty [between the United States and Italy] requiring that offenses be 'punishable by the laws of both Contracting Parties' if read literally would preclude reference to the laws of New York since New York is not a Contracting Party, it is well settled that treaties are to be construed liberally rather than literally.") (citing *Factor v. Laubenhimer*, 290 U.S. 276, 293 (1933)).

48. One district court put it this way:

A majority view, which this court adopts, is that it is only necessary to determine that the acts on which the foreign charges are based are proscribed by similar criminal provisions of federal law, the law of the asylum state or the law of the preponderance of states. This broad interpretation comports with the basic principle of international law that treaties should be construed to enlarge the rights of the parties.

In re Extradition of Prushinowski, 574 F. Supp. 1439, 1446 (E.D.N.C. 1983) (citing *Factor*, 290 U.S. at 293-94, for the second proposition) (citations omitted).

49. The Court gave the following rationale for its broad reading:

As the State of New York was the place where the accused was found and in legal effect the asylum to which he had fled, is the language of the treaty, "made criminal by the laws of both countries," to be interpreted as limiting its scope to acts of Congress, and eliminating the operation of the laws of the States? That view would largely defeat the object of our extradition treaties by ignoring the fact that for nearly all crimes and misdemeanors the laws of the States, and not the enactments of Congress, must be looked to for the definition of the offence [sic].

Wright v. Henkel, 190 U.S. 40, 58-59 (1903) (citation omitted).

50. *Collins v. Loisel*, 259 U.S. 309, 314-15 (1922).

51. *Factor v. Laubenhimer*, 290 U.S. 276 (1933).

criminality requirement could be satisfied, also added a new twist to the choice of law question. In *Factor*, the Court considered whether conduct which was clearly not criminal under the laws of the asylum state could nevertheless meet the dual criminality requirement. The Court held that dual criminality was satisfied because the two nations, Great Britain and the United States, had inserted the charged offense into their extradition treaty as an extraditable crime.⁵² Because of this reasoning, a showing by the fugitive that his conduct was not criminal under the law of the asylum state was not enough to escape extradition. *Factor* made clear that the laws of the asylum state were not controlling, clarifying some confusion which had arisen after *Wright* and *Collins*.⁵³ According to the *Factor* Court, an underlying rationale for the decision was the desire to avoid construing a treaty in a way that would cause the success of extradition requests by foreign nations to vary from state to state.⁵⁴ Modern courts have generally complied with *Factor* in this regard.

For example, the Second Circuit in *Shapiro v. Ferrandina*⁵⁵ looked to the language of the applicable treaty to determine which law to apply in ascertaining the criminality of the conduct. The defendant in *Shapiro* "demonstrate[d] convincingly" that his conduct was not criminal under the laws of the asylum state.⁵⁶ But rather than concluding that the dual criminality requirement was not satisfied, the court stated that "the Treaty refers not to the 'laws of the place where the person sought shall be found' . . . but to the 'laws of both parties.'" Since the United States rather than New York is a party to the Treaty, the Treaty impels us to look to the laws of the federal government⁵⁷ The court then found that, based on federal law, the defendant was extraditable on some, but not all, of the charges.⁵⁸

One modern court addressed a question left unanswered by

52. *Id.* at 299-300.

53. *Brauch v. Raiche*, 618 F.2d 843, 848 (1st Cir. 1980) ("In [*Factor*], the Court addressed the choice of law principle implicit in *Wright* and *Collins* that extraditability could be established *only* on the basis of the asylum state's law.").

54. *Factor*, 290 U.S. at 300.

55. 478 F.2d 894 (2d Cir.), *cert. dismissed*, 414 U.S. 884 (1973).

56. *Id.* at 910.

57. *Id.* (citations omitted).

58. *Id.* at 910-14.

the earlier cases: whether conduct which is criminal under the laws of the asylum state but not under the laws of the preponderance of states satisfies dual criminality. In *Brauch v. Rache*,⁵⁹ the First Circuit found that existing United States Supreme Court opinions were not dispositive of this question.⁶⁰ The *Brauch* court determined that an expansive reading of the dual criminality requirement was in order—following the liberal treaty interpretation validated by *Factor*.⁶¹ To that extent, the court was consistent with *Factor*. However, the court went considerably further, construing *Factor* as supporting a choice of law rule which would grant extradition from the asylum state if the conduct was criminal under the laws of that state but non-criminal in the majority of other states.⁶² This would appear to be at odds with *Factor's* express rationale that consistency among the states is more important than whether the conduct is criminal under the law of the asylum state.

Nevertheless, the current state of the law appears to be that if the offense is considered criminal under federal law, the law of the asylum state, or under the law of the preponderance of states, the dual criminality requirement is satisfied.⁶³ This reflects modern balancing. Courts liberally grant extradition for the sake of suppressing international crime, but because the act must be criminal under one of these bodies of law, the rights of the individual are also protected.

59. 618 F.2d 843 (1st Cir. 1980).

60. *Id.* at 850 ("We find neither the Supreme Court precedents nor the recent cases construing similar extradition treaties to be dispositive of the choice of law question in this case.").

61. *Id.* at 848.

62. *Id.* at 849 ("[W]e do not believe [that *Factor's*] disapproval of extraditability varying with state law would extend to the situation in which one state's law might confer extraditability, while that of the preponderance of the states would not.").

63. See, e.g., *id.* at 851; *Theron v. United States Marshal*, 832 F.2d 492, 496 (9th Cir. 1987) ("In assessing dual criminality, courts examine 'similar [criminal] provisions of federal law or, if none, the law of the place where the fugitive is found or, if none, the law of the preponderance of states.'") (citations omitted), *cert. denied*, 486 U.S. 1059 (1988); *Freedman v. United States*, 437 F. Supp. 1252, 1262 (N.D. Ga. 1977) ("In sum, we conclude that neither the laws of this state, nor the United States, nor a healthy majority of the states in this country recognize the commercial bribery contemplated by § 383 of the Canadian Criminal Code, with the result that such conduct is not criminal 'according to the laws of the place where the . . . person so charged shall be found' within the meaning of Article X of the instant treaty.").

III. PROSECUTORIAL PROBLEMS PRESENTED BY THE DUAL CRIMINALITY REQUIREMENT

Courts have offered differing rationales for weakening the dual criminality requirement's potential to foil a desired extradition attempt.⁶⁴ Even so, consistently underlying the dual criminality decisions has been the sentiment that the requirement may be relaxed—thus preserving international interest in extraditing an individual which both the requesting and requested States wish to extradite—while continuing to protect individuals from unjust foreign prosecution. The worldwide interest in liberal extradition policies has grown even stronger in the last twenty years as savvy international drug traffickers and terrorists seek to exploit the technicalities of the dual criminality requirement in order to avoid prosecution.⁶⁵

A. *The Dual Criminality Requirement and Complex Criminal Statutes*

The problems created worldwide by drug trafficking are staggering. Worldwide societal costs, including the cost of fighting the crime which accompanies the drug trade, exceed one hundred billion dollars annually.⁶⁶ In response, many governments, including the United States, have declared a "war on drugs."⁶⁷ Because drug trafficking is international in scope,⁶⁸ international extradition of drug criminals has become very important to the war on drugs. Extradition requests are steadily increasing worldwide as a direct result of the battle against the drug trade.⁶⁹ Many countries view extradition of drug criminals—especially to the United States—as essential, particularly "in those cases where the requested government is unable to keep major drug traffickers incarcerated because of the intimi-

64. See *supra* notes 20-25 and accompanying text.

65. See, e.g., *Spatola v. United States*, 741 F. Supp. 362 (E.D.N.Y. 1990), *aff'd*, 925 F.2d 615 (2d. Cir. 1991).

66. J. Richard Barnett, Comment, *Extradition Treaty Improvements to Combat Drug Trafficking*, 15 GA. J. INT'L & COMP. L. 285-90 (1985).

67. See Andrea M. Grilli, Note, *Preventing Billions from Being Washed Offshore: A Growing Approach to Stopping International Drug Trafficking*, 14 SYRACUSE J. INT'L L. & COM. 65 (1987).

68. Barnett, *supra* note 66, at 287.

69. Barbara Sicalides, Comment, *RICO, CCE, and International Extradition*, 62 TEMP. L. REV. 1281, 1283 n.20 (1989).

dation, through force and corruption, of public officials."⁷⁰ Therefore, denial of extradition based solely on dual criminality has become increasingly unpopular.

However, United States laws often used as grounds for extradition to the United States of international drug criminals, such as the Racketeer Influenced and Corrupt Organizations ("RICO") and Continuing Criminal Enterprise ("CCE-") Acts,⁷¹ are sometimes ruled invalid for purposes of international extradition because they fail the dual criminality requirement.⁷² One commentator explained why RICO and CCE offenses often fail the dual criminality requirement:

To sustain a conviction under RICO, the prosecution must demonstrate that the defendant conducted a pattern of racketeering activity, which is defined as the commission of at least two underlying predicate acts within ten years of each other. Once a pattern of racketeering activity is established, the prosecution must prove that the defendant engaged in any one of four different [prohibited] activities: (1) investing income derived from a pattern of racketeering in an enterprise engaged in or affecting interstate commerce; (2) acquiring an interest in such an enterprise through a pattern of racketeering; (3) operating such an enterprise through racketeering; or (4) conspiring to do any of the preceding. This second level of proof required under RICO may involve conduct that does not

70. *Id.* at 1316.

71. These statutes are popular among prosecutors because of their harsh penalties: "A drug offender convicted of CCE . . . faces a term . . . of twenty years to life imprisonment without possibility of parole. For a single RICO violation, imprisonment may be for up to twenty years." Steven A. Bernholz et al., *Problems of Double Criminality: International Extradition in CCE and RICO Cases*, TRIAL, Jan. 1985, at 58, 60.

72. Sicalides, *supra* note 69, at 1283; see also Steven A. Bernholz et al., *International Extradition in Drug Cases*, 10 N.C. J. INT'L L. & COM. REG. 353, 358 (1985) ("Because CCE and RICO are solely creatures of United States law, a defendant whose extradition is sought by the United States on such charges may argue successfully that the foreign country cannot extradite him, because these crimes do not constitute extraditable offenses under the treaty [and hence fail to meet the dual criminality requirement]."); Sandi R. Murphy, Comment, *Drug Diplomacy and the Supply-Side Strategy: A Survey of United States Practice*, 43 VAND. L. REV. 1259, 1290-91 (1990) ("In drug cases, the United States is often not able to request extradition for a specific crime, such as continuing criminal enterprise crimes, because the offense has no counterpart in the law of the foreign country.").

Note also that whereas dual criminality problems such as choice of law are unique to United States courts, the dual criminality problems presented by CCE and RICO are unique to foreign courts.

constitute criminal offenses in the requested state. Consequently . . . the double criminality principle . . . would bar the surrender of any RICO offenders requested by the United States.

The result is the same if the requested state rigidly applies the double criminality requirement to violations under CCE In order to successfully convict under CCE, the prosecution must also establish that the defendant occupies a management position in a group of at least five other individuals from which the defendant obtains substantial income or resources. Although the predicates underlying the CCE statute are, like RICO, commonly recognized offenses, the second level of proof required in a CCE prosecution—that the defendant occupy a supervisory position—arguably precludes extradition under a strict application of [the dual] criminality [requirement] because most other nations do not specifically make occupying a management position in a drug operation substantive crimes.⁷³

Despite the fact that CCE and RICO seem to present substantial barriers to extradition because they fail to meet the dual criminality requirement, international pressure to combat the drug crisis has led some foreign courts to hold that CCE and RICO claims are extraditable. Clearly such a finding can only be supported by the broadest interpretation of the dual criminality requirement.⁷⁴

For example, in *Sudar v. U.S.A.*,⁷⁵ a Canadian court granted the extradition of an individual wanted in the United States on RICO charges. The defendant in *Sudar* argued that extradition would violate the principle of dual criminality. The Ontario Supreme Court, however, held that the dual criminality requirement was met because the RICO charges involved murder, arson, conspiracy, and extortion, and such crimes were also

73. Sicalides, *supra* note 69, at 1310-11 (citations omitted); see also Bernholz et al., *supra* note 71, at 60 ("Because CCE and RICO are unique to U.S. law, defendants whose extradition is sought by the United States on CCE and RICO charges may successfully argue that the foreign country cannot extradite them because their crimes do not constitute extraditable offenses under the applicable treaty."); Kester, *supra* note 21, at 1462 ("The requirement of dual criminality should stand as an important bar to extradition in many cases involving federal rather than state crimes, for most federal offenses are structured much differently from common law antecedents. The barrier it creates is most apparent when the United States is the party seeking extradition of a person from abroad.").

74. Sicalides, *supra* note 69, at 1310.

75. 25 S.C.R. 3d 183 (Can. 1981).

criminal in Canada.

Similarly, the Australian High Court, when presented with a U.S. request to extradite a person facing CCE charges, determined that such an offense was extraditable despite the fact that no similar charge existed under Australian law. The court addressed possible dual criminality problems by using the following reasoning:

As a generally accepted limitation of obligations under extradition treaties, [double criminality] avoids the international complications and ill-will which are likely to result from an ad hoc refusal of extradition based on the unacceptability to the requested state of particular laws of a requesting state. The utility of the principle of double criminality is, however, likely to be outweighed by the impediment which it represents to the advancement of criminal justice if its content is defined in over-technical terms which would preclude extradition by reason of technical differences between legal systems notwithstanding that the acts alleged against the accused involve serious criminality under the law of both the requesting and requested states.⁷⁶

Such logic comports with reasoning used by United States courts during this century as they determined that an expansive reading of the dual criminality requirement was justified for reasons mentioned above.⁷⁷ Nevertheless, some international scholars fear that individual rights are being recklessly endangered and have criticized decisions such as *Sudar* and *Riley* as unduly broad interpretations of the dual criminality requirement.⁷⁸

Despite such sentiment, courts in the United States seem willing to accept the liberal approach to dual criminality taken by foreign courts. This is especially true when drug offenses are involved. For example, in *United States v. Levy*,⁷⁹ the Tenth Circuit heard the appeal of a man extradited to the United States from Hong Kong on CCE charges, for which he was later

76. *Riley v. Commonwealth*, 60 A.L.J.R. 106, 111 (Austl. 1985), quoted by Sicalides, *supra* note 69, at 1314.

77. The Australian High Court's language bears resemblance to language from *Factor v. Laubenheimer*, 290 U.S. 276 (1933). See *supra* note 40 and accompanying text.

78. See, e.g., BASSIOUNI, *supra* note 11, at 354; Bernholz et al., *supra* note 72, at 361-64.

79. 905 F.2d 326 (10th Cir. 1990), cert. denied, 111 S. Ct. 759 (1991).

convicted. The appellant claimed that "CCE is not an extraditable offense because of the lack of a crime in Hong Kong having analogous elements."⁸⁰ The court responded that such an argument "misstates the nature of the dual criminality requirement." The court held instead that, "[t]he focus of dual criminality is not on how the crime is defined in the particular statutes the defendant is accused of violating; it is on the criminality of the defendant's alleged conduct."⁸¹ Therefore, the court determined that because the basis of the CCE charge was the defendant's participation in a cocaine trafficking operation and such conduct was proscribed by the laws of both the requesting and requested State, the dual criminality requirement had been satisfied.⁸²

However, some nations have not adopted the United States' liberal view of the dual criminality requirement and, consequently, routinely deny extradition requests from the United States based on CCE and RICO charges.⁸³ Usually nations

80. *Id.* at 328.

81. *Id.*

82. *Id.* Other recent decisions also show United States courts' willingness to stretch the dual criminality requirement in whatever manner is necessary in order to convict drug traffickers. In *Spatola v. United States*, 741 F. Supp. 362 (E.D.N.Y. 1990), *aff'd* 925 F.2d 615 (2d Cir. 1991), a U.S. district court granted a request by the Italian government to extradite a fugitive wanted for conspiracy to engage in the trafficking of narcotics. Bassiouni himself appeared at the trial on behalf of the defendant. Even so, the court—quoting Bassiouni—held that the extradition request was justified. Although a crime with similar elements was not to be found in United States state or federal law, the court nevertheless found that the dual criminality requirement had been satisfied because the conduct was criminal in both jurisdictions. *Id.* at 372-73.

Interestingly, the court in *Spatola* devoted a substantial portion of its opinion to justifying its decision on the grounds that the executive branch of government supported the extradition request. For example, the court gave great deference to the political considerations behind extradition of drug criminals, stating that "undue interference with the diplomatic process of extradition by the judicial branch is as unseemly and disruptive of separation of powers and of the foreign relations of the nation as any judicial foray into this very political realm." *Id.* at 370. Therefore, the court relegated its role to simply determining "whether the executive branch is authorized by statute and treaty to honor a particular extradition request." *Id.*

83. Bernholz et al., *supra* note 72, at 357-58; see also Sicalides, *supra* note 69, at 1283 ("To prosecute drug producers who conduct their illicit activities outside the United States, prosecutors must extradite them from the nations in which they have asylum. The effectiveness of RICO and CCE [in combatting the international drug problem], however, have [sic] been severely limited by the refusal of some nations to extradite individuals who import narcotics into the United States . . .").

deny such extradition requests due to respect for past decisions which utilized a strict reading of dual criminality.⁸⁴ For example, last year the Swiss Justice Department received a request from the United States to extradite the now famous international financier Adnan Khashoggi. Although the Swiss Justice Department agreed to turn over Khashoggi to face fraud charges, it refused to extradite him on RICO charges. The rationale for the decision was that "[e]xtradition [on the RICO charges] is not possible because of the lack of mutual criminality."⁸⁵

Such nations may be missing the point of the dual criminality requirement. The dual criminality requirement is now based largely on principles of international comity and cooperation in combatting crimes. For example, since fighting the drug trade is an international goal, dual criminality barring extradition of drug criminals would stand the requirement on its head. The following comment's reasoning is compelling:

In essence, double criminality is a reciprocity requirement that is intended to ensure states that they can depend on corresponding treatment, and that no state will be forced to use its processes to surrender an individual, possibly one of its own nationals, to be prosecuted and punished for conduct that the requested state does not deem deserving of punishment. Reciprocity is required throughout extradition agreements because of political considerations and the sovereignty doctrine. Even though no other nation has enacted statutes with . . . structures similar to RICO and CCE, most nations condemn the activities that these two statutes target and all have their own legislation aimed at the same final result—elimination of narcotics trafficking. International conventions such as the Single Convention on Narcotic Drugs evidence the international community's resolve to stem narcotics trafficking. Reciprocity and sovereignty do not require that conduct universally considered abhorrent go unpunished because of the use of unusual elements designed to reach the worst offenders

. . . .

Because international cooperation is essential in the battle against narcotics traffickers, and most nations consider drug

84. Another reason some nations retain the stricter view of dual criminality is fear of terrorist reprisals by drug traffickers who fear extradition to the United States. See *infra* note 130.

85. *Swiss Extradite Khashoggi to Face U.S. Fraud Charges*, REUTERS NEWS REPORTS, July 19, 1989, AM Cycle.

trafficking illegal, there is no need for rigid application of the double criminality requirement in this context.⁸⁶

Some would disagree, claiming that international doctrines such as dual criminality should be strictly interpreted, thereby always barring extradition based on RICO or CCE charges.⁸⁷ However, the integrity of dual criminality can arguably be preserved in cases where the requested State does not wish to extradite. Should this occur, the requested State could simply refuse the request based on exceptions to the duty to extradite established by international law.⁸⁸ This would increase the effectiveness of CCE and RICO in combatting the international drug problem.⁸⁹ Nevertheless, disagreement remains over how far to extend the dual criminality principle when a fugitive faces RICO or CCE charges.

B. The "Special Use" Jurisdictional Problem of the Dual Criminality Requirement

Another area in which the dual criminality requirement

86. Sicalides, *supra* note 69, at 1313-14 (citations omitted). Bedi also supports this position:

The law of extradition is an instrument of international co-operation for the suppression of crime, in which all nations have a common interest, because crime constitutes a menace to any human society and weakens the very foundations of social life. If by simply placing himself outside the territory of the state in which he has committed a crime, a criminal places himself beyond the reach of the law which he has violated and if so without any risk he manages to escape penalty attached to his guilt by simply fleeing to a foreign country, there will be a complete failure of justice.

BEDI, *supra* note 1, at 47-48, *quoted in* Sicalides, *supra* note 69, at 1315.

87. See, e.g., Bernholz et al., *supra* note 71, at 61-63:

[W]hen all the elements [of CCE] are taken together, it is plain that the offense is an exclusive genus of U.S. criminal law. As the crime is not recognized as punishable in foreign countries, it cannot satisfy the principle of double criminality and hence cannot be an extraditable offense.

Because RICO is unknown to foreign law, if the United States seeks the extradition of an alleged drug offender for a RICO offense, the requested country should not grant the warrant.

Id.

88. Such exceptions could include the political offense exception, or language included in many treaties which states that the dual criminality requirement is to be liberally interpreted. BASSIUNI, *supra* note 11, at 10-12.

89. Sicalides, *supra* note 69, at 1316.

has caused problems is its use in cases of extraterritorial crimes. Most problematic are terrorist acts against nationals of one country who are in another country,⁹⁰ and participation in international drug trafficking conspiracies.⁹¹ Following such conduct, requested States may justifiably refuse an extradition request on the ground that the requesting State has no jurisdiction over extraterritorial crimes.⁹² This occurs when the jurisdictional theory used by the requesting State is not recognized by the requested State. In this situation, the offense is not considered extraditable under the laws of the requesting State. Therefore the dual criminality principle bars extradition. This is known as the "special use" of the dual criminality requirement.⁹³

Because this "special use" of the dual criminality requirement presents another obstacle to the modern balance between individual rights and the international interest in suppressing crime, courts have sought to relax this aspect of dual criminality as well. However, as yet no principled method has been found to overcome this obstacle due to the variety of often mutually exclusive jurisdictional theories utilized by different nations. An examination of some of these theories of extraterritorial jurisdiction and their potential inapplicability in the areas of international drug trafficking conspiracies or acts of international terrorism follows.

1. *The five traditional bases of extraterritorial jurisdiction*

There are five traditional bases of jurisdiction potentially covering extraterritorial acts: territorial, protective, nationality,⁹⁴ passive personality, and universality.⁹⁵ While all of

90. See *infra* notes 116-20 and accompanying text.

91. See *id.*

92. See *id.*

93. Christopher L. Blakesley, *A Conceptual Framework for Extradition and Jurisdiction over Extraterritorial Crimes*, 1984 UTAH L. REV 685, 744-45. Professor Blakesley made the following comment about this "special use" of the dual criminality requirement:

A specialized notion of double criminality that generally works to deny extradition, even when the offense on which the extradition request is based constitutes a crime in each state and is listed in the treaty as extraditable, will be labelled the "special use" of double criminality. Extradition will be denied when the theory of jurisdiction maintained by the requesting state is not accepted by the requested state.

Id.

94. This theory is also known as active personality. See, e.g., BASSIOUNI, *supra*

these jurisdictional bases have the potential to cover extraterritorial crimes, an analysis of each shows that extraterritorial jurisdiction asserted under any one of these bases may fail.

a. The territorial basis of extraterritorial jurisdiction. The territorial basis of jurisdiction allows a country to enact domestic laws which prohibit certain conduct committed within its territory.⁹⁶ A strict interpretation of territorial jurisdiction requires that the entire proscribed act be committed within the territory of the requested State.⁹⁷ Some nations have adopted more liberal interpretations of the territorial principle of jurisdiction, such as subjective and objective territoriality. Subjective territoriality provides that if one of the elements of the crime is committed within the territory of the requesting nation, that nation has jurisdiction to prosecute.⁹⁸ Objective territoriality is even more liberal, allowing for the prosecution of an individual engaged in conduct proscribed by the requesting State even when the act occurred wholly outside of the State.⁹⁹ The only requirement here is that the act produce harmful effects within the requesting State.¹⁰⁰

Most nations have adopted the more liberal objective view of the territorial basis for jurisdiction. Consequently, "[a]s long as the offense itself, its result or effect, or any of the constituent

note 11, at 253.

95. Blakesley, *supra* note 93, at 687.

96. SWEENEY, ET AL., *supra* note 7, at 85-90.

97. See Blakesley, *supra* note 93, at 689.

98. See *id.* at 691.

99. For a general discussion of the objective territorial theory of jurisdiction, see BASSIOUNI, *supra* note 11, at 261-68.

100. SWEENEY ET AL., *supra* note 7, at 90-108. The authors also cite the *Restatement on the Law of Foreign Relations* 18 (1965) as an express acceptance of this liberal view of territorial jurisdiction:

A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory, if either

(a) the conduct and its effect are generally recognized as constituent elements of a crime or tort under the law of states that have reasonably developed legal systems, or

(b)(i) the conduct and its effect are constituent elements of activity to which the rule applies; (ii) the effect within the territory is substantial; (iii) it occurs as a direct and foreseeable result of the conduct outside the territory; and (iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems.

Id. at 107-08.

or material elements actually occur within the sovereign territory of the requesting party, assertion of jurisdiction will be seen as proper in either state and extradition will be approved"¹⁰¹

b. *The protective basis of extraterritorial jurisdiction.* Protective extraterritorial jurisdiction exists when an extraterritorial offense "has or potentially has an adverse effect on or poses a danger to a state's security, integrity, sovereignty, or governmental function."¹⁰² Although this definition of protective jurisdiction sounds similar to the objective territoriality theory,¹⁰³ there is a distinction between the two.¹⁰⁴ Under the objective territoriality theory, jurisdiction exists if the extraterritorial act has any harmful effect within the State. The protective theory of jurisdiction, by contrast, allows for the exercise of jurisdiction over extraterritorial acts even when those acts do not result in an effect within the requesting State, but merely constitute a threat to the requesting State's national security or other vital interest.¹⁰⁵ In other words, whereas objective territorial jurisdiction requires at least some effect within the State, protective jurisdiction requires only a *potential* effect within the State. The breadth of this jurisdictional theory has made it attractive to nations searching for ways to convict participants in foiled international drug trafficking conspiracies which intend to have a harmful effect on a nation, but in fact do not because they are unsuccessful.¹⁰⁶

c. *The nationality basis of extraterritorial jurisdiction.* The nationality theory of jurisdiction provides that citizens are entitled to the protection of their nation "even when they are out-

101. Blakesley, *supra* note 93, at 701.

102. *Id.*

103. See *supra* notes 98-99 and accompanying text.

104. Blakesley, *supra* note 93, at 701.

105. *Id.* at 702. Professor Blakesley made the following comment regarding the principle of protective jurisdiction:

The protective principle is designed to allow a state to protect itself against and to punish the perpetrators of actual and inchoate offenses that damage or threaten to damage state security, sovereignty, treasury or governmental functions. It is the only accepted theory that allows jurisdiction over conduct that threatens potential danger to the above-mentioned interests or functions and, because of the significant dangers it poses to relations among nations, it is limited to those recognized and stated interests or functions.

Id. at 705.

106. See Bernholz et al., *supra* note 72, at 370-71.

side its territorial boundaries."¹⁰⁷ The rationale for this jurisdictional theory is that

[f]rom the perspective of international law, nationals of a state remain under that state's personal sovereignty and owe their allegiance to it, even though travelling or residing outside its territory. The state has legal authority under international and domestic law, based on that allegiance, to assert criminal jurisdiction over actions of one of its nationals deemed criminal by that state's laws.¹⁰⁸

Accordingly, in cases of extradition, if both the requesting and the requested States recognize this theory of jurisdiction, then terrorists and international drug traffickers can be convicted by their nation of origin when they commit such activities abroad.

d. The passive personality basis of extraterritorial jurisdiction. Under the nationality theory, nationals residing or travelling outside of their State are nevertheless subject to its jurisdiction when they commit certain crimes. The passive personality theory, conversely, provides that a nation has jurisdiction over those who commit crimes against its citizens while they are abroad. The reasoning behind this theory is that "[s]ince the ultimate welfare of the state itself depends upon the welfare of its nationals, it can be asserted that a state has a legitimate interest in the prosecution of those who have been found guilty of committing crimes against its nationals while abroad."¹⁰⁹ This jurisdictional theory is especially popular in Europe. For example, France enacted a law in 1975 recognizing its right to prosecute individuals engaged in activities which harm French nationals abroad.¹¹⁰ Blakesley notes that, "[c]ompared to the other nations of Europe, France was actually late in developing the passive personality principle to this extent."¹¹¹ However, other nations, including the United States, reject this theory.¹¹²

e. The universality basis of extraterritorial jurisdiction.

107. BASSIOUNI, *supra* note 11, at 288.

108. Blakesley, *supra* note 93, at 706 (citations omitted).

109. BASSIOUNI, *supra* note 11, at 291.

110. Blakesley, *supra* note 93, at 713-14. Clearly the motivation behind the enactment of this law was the 1974 Hague incident, in which French nationals were taken hostage. *Id.*

111. *Id.* at 715 n.94.

112. *Id.* at 715.

This basis of jurisdiction is reserved for acts considered universally reprehensible. Under this jurisdictional theory, all States may participate in the prosecution of individuals engaged in such activities because of a common interest in punishing such conduct.¹¹³ Professor Bassiouni gave the following rationale for this jurisdictional basis:

Some offenses, due to their very nature, affect the interests of all states, even when committed in a given state or against a given state, victim, or interest. Such offenses may even be committed in an area not subject to the exclusive jurisdiction of any state, such as the high seas, air space or outer space. The gravamen of such an offense is that it constitutes a violation against mankind Any state, if it captures the offender, may prosecute and punish that person on behalf of the world community.¹¹⁴

This jurisdictional theory has often been applied to acts such as piracy, genocide, and various war crimes.¹¹⁵

2. *"Special use" of dual criminality as a bar to extradition*

Having authority to proscribe extraterritorial conduct is only the first step in prosecuting such conduct. An additional prosecutorial prerequisite is a showing that the nation seeking to enforce its laws has jurisdiction to do so. In the extradition context, the requesting State must present a mutually acceptable jurisdictional theory before the dual criminality requirement can be satisfied.¹¹⁶

Because "jurisdictional issues are determined by the requested State,"¹¹⁷ problems often arise when the basis of the requesting State's extraterritorial jurisdiction is not recognized by the requested State.¹¹⁸ When this is the case, the "special

113. See SWEENEY ET AL., *supra* note 7, at 118.

114. BASSIOUNI, *supra* note 11, at 298.

115. SWEENEY ET AL., *supra* note 7, at 118.

116. *Id.* at 84-85. This jurisdictional aspect of the dual criminality requirement is known as its "special use." Therefore, satisfaction of dual criminality requires not only that the act be considered criminal by both the requesting and requested States, but that each State recognize the jurisdictional theory invoked by the requested State in its attempt to prosecute the fugitive.

117. BASSIOUNI, *supra* note 2, at 313.

118. Another problem arising in this area is that of concurrent jurisdiction. When both the State requesting extradition and the State receiving the request claim to have jurisdiction over an individual, principles of sovereignty may compel

use" of the dual criminality requirement may bar extradition even when any or all of the traditional bases of extraterritorial jurisdiction are invoked by the requesting nation. One area in which this has consistently been a problem is drug conspiracies. Although this offense comes close to fitting several of the traditional jurisdictional categories, and may fit them in certain circumstances, the traditional bases of extraterritorial jurisdiction often fail to provide prosecutorial possibilities.¹¹⁹ Similarly, acts of international terrorism may go unprosecuted because the requesting and requested States cannot agree on a mutually acceptable jurisdictional theory.¹²⁰

a. *"Special use" problems under the territorial basis of extraterritorial jurisdiction.* This approach is probably the most likely to survive the "special use" of the dual criminality requirement because nearly all nations recognize this principle of jurisdiction.¹²¹ However, a strict application of this principle would often preclude extradition for extraterritorial crimes because such an interpretation requires that the act be committed wholly inside the boundaries of the nation requesting extradition. In cases of international activities such as terrorism and drug trafficking, this is rarely the case. Therefore, an expansive interpretation of the requirement, such as the objective territoriality theory, is necessary. But because not all nations have accepted such a broad interpretation, extradition may be denied in instances where the requested State does not recognize the objective territoriality theory.

Even extradition requests involving nations which have accepted the objective territoriality theory may fail because the "effect" on the requesting State required by this theory is so tenuous that it will not be recognized by the requested

the requested State to deny the extradition request. See CLYDE EAGLETON, *INTERNATIONAL GOVERNMENT* 87 (3d ed. 1957). A detailed discussion of this problem is outside the scope of this paper.

119. Blakesley, *supra* note 93, at 719-20.

120. See *infra* notes 121-26 and accompanying text; see also Christopher L. Blakesley, *Jurisdiction as Legal Protection Against Terrorism*, 19 CONN. L. REV. 895 (1987). The political offense exception also may present a barrier to extradition in cases of international terrorism. In addition to his works on extraterritorial jurisdiction, Professor Blakesley has also discussed extradition and acts of international terrorism in Christopher L. Blakesley, *The Evisceration of the Political Offense Exception to Extradition*, 15 DEN. J. INT'L L. & POL'Y 109 (1986).

121. BASSIOUNI, *supra* note 11, at 254.

State.¹²² This is often the case with drug conspiracies, or conspiracies to commit terrorist acts, especially when these conspiracies fail. This would include situations in which perpetrators are still in the planning stages, or when they are caught during an attempt to engage in such activities, but prior to doing any actual damage to the requested State.¹²³ When this occurs, even though the intent to commit an act designed to have an "effect" on the requested State is clear, intent alone is usually not enough to fit squarely under the objective territoriality theory.¹²⁴ In such circumstances, dual criminality's "special use" may bar extradition.

b. *"Special use" problems under the protective basis of extra-territorial jurisdiction.* Many nations refuse to extradite individuals when the requesting State asserts the protective theory of jurisdiction. A principle reason for the reluctance to accept this theory is its intrusiveness. As Professor Bassiouni noted:

There is . . . no general rule of international law which prohibits the application of this theory either on a restricted or an unlimited basis. The potential for using this theory in extradition is very vast. Indeed, if the authoritative decision-making process of a given participant is without restriction as to what constitutes conduct performed outside its boundaries but having an internal effect on its interest, which it deems itself competent to protect, then almost every act by any person which affects the political and economic interest of a state could subject such person to the jurisdiction of that state.¹²⁵

Because nations do not wish to subject their own nationals to such intrusive jurisdiction, they often will refuse extradition requests based on this theory. The United States is one such nation.¹²⁶ In addition, because the protective principle is "traditionally limited to offenses that pose a threat to national security, sovereignty or some important governmental function,"¹²⁷ some argue that drug conspiracies, and even terrorism, do not constitute such a threat.¹²⁸

122. Blakesley, *supra* note 93, at 701.

123. *Id.* at 755.

124. Bernholz et al., *supra* note 72, at 370-71; Blakesley, *supra* note 93, at 719.

125. BASSIOUNI, *supra* note 11, at 297.

126. *See id.*

127. Blakesley, *supra* note 93, at 720.

128. *See id.*

c. "Special use" problems under the nationality basis of extra-territorial jurisdiction. The nationality basis of jurisdiction may also present "special use" dual criminality problems. Bassiouni noted that although this principle of jurisdiction is "universally accepted," because "its precise definition and application differs widely,"¹²⁹ the requesting and requested States may not agree on the interpretation of nationality jurisdiction posed by the requested State. Therefore, under the "special use" of the dual criminality requirement, the requested State may be forced to deny the extradition request because the two nations' conceptions of nationality jurisdiction differ. Given Professor Bassiouni's statement, this is not unlikely.

In addition, because the act is committed in a foreign jurisdiction, the issue consistently arises as to who should prosecute—the nation of the offender's citizenship, or the nation which apprehended the offender. If the act is criminal in the requested State, that State has the right, under the principle of territorial jurisdiction, to prosecute the person committing a criminal act within its borders. Because some criminals, especially drug traffickers, often have control over governmental processes in certain nations, there is a high probability that such criminals may "convince" the requested State to proceed itself rather than grant extradition.¹³⁰

129. BASSIOUNI, *supra* note 11, at 288.

130. See Sicalides, *supra* note 69, at 1316. Professor Sicalides commented on the necessity of extradition in such situations:

Extradition is essential, especially in those cases where the requested government is unable to keep major drug traffickers incarcerated because of the intimidation, through force and corruption, of public officials. "It is the threat of extradition . . . that has drawn the ire of Columbia's drug mafia. Extradition is the thing they fear the most . . . Everything else is just the cost of doing business." Extradition is the primary fear of these major drug traffickers because it is frequently all that stands between themselves and prosecution.

Id. (citation omitted). Another example of this fear is the recent surrender of many of Columbia's top drug cartel members following an offer from the Colombian government to try them in that country rather than extradite them to the United States. TIME recently reported the following:

SURRENDERED. Jorge Luis Ochoa Vasquez, 41, No. 2 man of the violent Medellin cocaine cartel who is wanted on drug trafficking charges in the U.S.; to Colombian authorities; in Caldas, Colombia. The fifth cartel member to turn himself in in recent months, Ochoa took advantage of a Colombian government promise that traffickers who give up will not be extradited to the U.S. Ochoa's move could trigger more surrenders, but U.S. officials are concerned that Colombia may treat those who come

d. "Special use" problems under the passive personality basis of extraterritorial jurisdiction. Because the passive personality theory is not accepted in many jurisdictions,¹³¹ "special use" of dual criminality will often bar extradition. Several cases illustrate the failure of the passive personality principle of jurisdiction to provide for extradition of an individual committing an offense against a national of the requesting State. In the *Abu Daoud* case,¹³² Israel requested the extradition of Daoud on charges involving the 1972 Munich Olympics massacre. France was forced to deny the request because it did not adhere to the passive personality basis of jurisdiction at the time that the massacre occurred. Therefore, the court reasoned that the dual criminality requirement could not be satisfied, and Daoud was released.

The United States has also denied extradition requests for similar reasons. In 1940, Mexican officials requested the extradition of an American citizen "for crimes committed against a Mexican national outside Mexican territory."¹³³ The asserted basis of extraterritorial jurisdiction was the passive personality principle. The United States denied the request. The State Department expressly based its decision on the special use of the dual criminality requirement, stating that although Mexico had adopted the passive personality principle, the United States had not, and therefore extradition was impermissible.¹³⁴

e. "Special use" problems under the universality basis of

forward too leniently.

Surrendered, TIME, Jan. 28, 1991, at 87.

131. Chief among these is the United States:

The passive personality theory of jurisdiction is generally considered anathematic to United States law. The Restatement (Second) of Foreign Relations Law contains the traditional repudiation of the principle: "A State does not have the jurisdiction to prescribe a rule of law attaching a legal consequence to conduct of an alien outside its territory merely on the ground that the conduct affects one of its nationals" [T]he United States government has vehemently protested any assertion of jurisdiction by foreign courts over acts of United States nationals committed against nationals of the forum state outside that state's territory.

Blakesley, *supra* note 93, at 715.

132. Blakesley, *supra* note 93, at 746-56 (citing 1977 Clunet 843 (Cours d'Appel)); see also Mare Poirier, Note, *International Terrorism: Extradition*, 18 HARV. INT'L L.J. 467 (1977) (commenting on the *Abu Daoud* case).

133. Blakesley, *supra* note 93, at 747.

134. See WHITEMAN, *supra* note 17, at 104.

extraterritorial jurisdiction. The biggest barrier to recognition of this jurisdictional theory is the categorization of an act as universally reprehensible. Dual criminality problems arise in this context because some nations categorize certain acts as universally reprehensible while others do not. For example, crimes traditionally fitting within the universality theory have been piracy, slavery, and genocide.¹³⁵ However, "[t]here is a growing trend to include terrorism and traffic in narcotic drugs" as universal crimes.¹³⁶ If this trend continues, countries could then proceed to extradite individuals on these charges without fear of the dual criminality requirement barring the extradition request. Even so, terrorism and drug trafficking have not yet achieved this status.¹³⁷ Consequently, it would be difficult, if not impossible, to assert that this basis of jurisdiction warranted extradition for these crimes.

IV. SUGGESTED RESOLUTIONS

Although the dual criminality requirement has been loosely interpreted by most courts, and extradition rarely fails because of it, when dual criminality does block otherwise legitimate extradition requests it undermines the very policies behind permitting extradition. In order to serve the purposes for which it exists,¹³⁸ while not preventing extradition when it would be appropriate, certain changes should be implemented. Possible changes are the adoption of the proposals of the Tenth International Congress of Penal Law ("Tenth International Congress"), and/or the rewording of the dual criminality provisions to reflect the model presented in a recent amendment of a U.S.—West Germany Treaty. A solution to the "special use" of the dual criminality requirement would be to amend extradition treaties to reflect language found in the U.S.—Japan extradition treaty, and/or to adopt an alternate interpretation of the objective territoriality theory of jurisdiction.

135. See *supra* note 115 and accompanying text.

136. Blakesley, *supra* note 93, at 718.

137. *Id.* at 718-19 (commenting that terrorism and drug trafficking do not warrant categorization as universal crimes); SWEENEY ET AL., *supra* note 7, at 118 ("Despite the increase in the number of acts of terrorism in recent years, it is still a matter of controversy whether it is a crime of universal interest.").

138. See *supra* note 6 and accompanying text.

the objective territoriality theory of jurisdiction.

*A. Proposals to Allow Extradition to
the United States for CCE and RICO Charges*

1. Adopt proposals of the Tenth International Congress

The Tenth International Congress, which met in 1969, adopted a resolution which mandates that the requested State set aside the dual criminality requirement unless special circumstances exist.¹³⁹ Such special circumstances would involve political turmoil in the requesting State or evidence that the extradition request is simply subterfuge to return a person for political, rather than penological purposes.¹⁴⁰ In such a situation, the requested State would be under no obligation to extradite the fugitive because of the political offense exception.¹⁴¹ In addition, a court could use the loose *in concreto* method of applying the dual criminality requirement, and find a way to avoid extradition.¹⁴²

Such an approach would permit the United States to pursue drug traffickers and the like using RICO and CCE charges. However, because countries refusing to comply with such a resolution would still be able to deny extradition requests under more strict applications of the dual criminality requirement, this solution is potentially incomplete.

2. Amend extradition treaties to reflect the extradition treaty between the United States and West Germany

A more effective, but perhaps less efficient route to change would be to rework existing extradition treaties to reflect the language of a recent amendment to a U.S.—West Germany extradition treaty. The now amended 1978 version of the dual criminality portion of the extradition treaty defines extraditable offenses as follows:

(1) Extraditable offenses under this treaty are:

139. 41 *Revue Internationale de droit penal* 12 (1970), cited in BASSIOUNI, *supra* note 2, at 322.

140. *Id.*

141. SWEENEY ET AL., *supra* note 7, at 142.

142. *Id.*; see also *supra* note 26 and accompanying text. This approach has the support of Professor Bassiouni. BASSIOUNI, *supra* note 2, at 322.

- (a) Offenses described in the Appendix to this Treaty which are punishable under the laws of both Contracting Parties;
- (b) Offenses, whether listed in the Appendix to this Treaty or not, provided they are punishable under the Federal laws of the United States and the laws of the Federal Republic of Germany.

In this connection it shall not matter whether or not the laws of the Contracting Parties place the offense within the same category of offenses or denominate an offense by the same terminology.¹⁴³

This version ensures that courts will interpret the dual criminality provision in a liberal manner. However, this version falls short of the revised version, which reads:

- (1) Extraditable offenses under the Treaty are offenses which are punishable under the laws of both Contracting Parties. In determining what is an extraditable offense it shall not matter whether or not the laws of the Contracting Parties place the offense within the same category of offense or denominate an offense by the same terminology, or whether dual criminality follows from Federal, State or L  nder [German state] laws. In particular, dual criminality may include offenses based upon participation in an association whose aims and activities include the commission of extraditable offenses, such as a criminal society under the laws of the the Federal Republic of Germany or an association involved in racketeering or criminal enterprise under the laws of the United States.¹⁴⁴

Clearly the improved language of the Treaty is intended to resolve some of the problems created by complex criminal statutes such as RICO and CCE. The new language facilitates extradition in cases where both the requesting and the requested States wish to extradite but would have been unable to under the prior language. The modification also includes language which eliminates any confusion over choice of law issues.¹⁴⁵

143. Treaty between the United States of America and the Federal Republic of Germany Concerning Extradition, June 20, 1978, U.S.—F.R.G., 32 U.S.T. 1485, 1489, *quoted in* BASSIOUNI, *supra* note 11, at 334.

144. Supplementary Extradition Treaty, Oct. 21, 1986, U.S.—F.R.G., S. Treaty Doc. No. 100-6, 100 Cong., 1st Sess. (1987), *quoted in* BASSIOUNI, *supra* note 11, at 335.

145. See *supra* notes 45-63 and accompanying text. Note that the language in the treaty makes it clear that whether the law making the conduct criminal stems

Although clearly time-consuming, the addition of similar language to all bilateral extradition treaties to which the United States is a party would effectively resolve nearly all of the problems currently associated with the dual criminality requirement.

Another alternative, directly targeted at international drug crimes, would be a multilateral treaty which would contain CCE, RICO, and terrorism charges as extraditable offenses. By making such actions internationally criminal, the problem of dual criminality would be overcome. This is the approach advocated by United Nations Secretary General Javier Perez de Cuellar at the forty-fourth General Assembly Session.¹⁴⁶

*B. Proposals to Cure the Defects of
the "Special Use" of Dual Criminality*

The "special use of double criminality . . . often does contradict general principles of jurisdiction and will cause denial of extradition when perhaps it ought to succeed."¹⁴⁷ Therefore, some changes are in order. There have been several suggested resolutions to the "special use" of the dual criminality requirement, especially in cases involving terrorism and international drug trade. For example, in an attempt to cure jurisdictional problems with the extradition and prosecution of terrorists acts committed against United States nationals abroad, Congress passed a law in 1986 which provides for extraterritorial jurisdiction over terrorists acts committed abroad against United States nationals.¹⁴⁸

from a federal or a state source, as long as the act is criminal, the dual criminality requirement is satisfied.

146. *To Crush Crime, Humanize Justice; Preview of the Eighth United Nations Crime Congress*, 27 U.N. CHRONICLE, June 1990, at 41.

147. Blakesley, *supra* note 93, at 751.

148. 18 U.S.C. 2331 (1986); *see also*, SWEENEY ET AL., *supra* note 7, at 123-25 (providing text of the law, as well as commentary); Brandon S. Chabner, *The Omnibus Diplomatic Security and Antiterrorism Act of 1986: Prescribing and Enforcing United States Law Against Terrorist Violence Overseas*, 37 UCLA L. REV. 985 (1990) (discussing potential jurisdictional problems with the new law). The Chairman of the House Subcommittee on Crime, William J. Hughes (D-NJ), pointed out at a later session that the bill was drafted in a manner intended to avoid conflicts with the dual criminality principle:

[W]e found that, in drafting the law, particular attention had to be paid to another body of law—that relating to international extradition. They go hand in hand. Since these offenses are, by definition, committed outside our country, we frequently will need to seek the cooperation of another

Two problems are presented by the United States' solution to the special use of the dual criminality requirement. First, the law provides for capital punishment upon conviction. Several nations, including Germany, refuse to extradite individuals who face a possible death sentence because such a penalty is not allowed under their laws.¹⁴⁹ Second, some nations will not recognize the exercise of jurisdiction based upon the nationality of the victim. Therefore, the fact that the United States thinks it has jurisdiction over a particular matter may not convince the requested State of United States compliance with the special use of the dual criminality requirement. Because of these problems, exploration of alternative solutions is warranted.

1. Adopt language of the United States—Japan Extradition Treaty

The language of the recently adopted United States—Japan extradition treaty provides a model for circumventing "special use" problems. The applicable language provides:

When the offense for which extradition is requested has been committed outside the territory of the requesting Party, the requested Party shall grant extradition if the laws of that Party provide for the punishment of such an offense committed outside its territory, or if the offense has been committed by a national of the requesting Party.¹⁵⁰

government in extraditing those who murder or assault U.S. nationals.

With this in mind, we found it necessary to modify the language of the law so the requirement of dual criminality is met. Dual criminality means that both our country and the country from which we are seeking extradition have comparable laws covering the conduct in question. A law written in special language describing international terrorism might not match up with a similar law in Germany or Japan. We solved this problem by making the statute essentially a murder statute which is then linked to terrorist-type circumstances by a certification of the Attorney General.

Federal News Service, *Hearings of the Crime Subcommittee of the House Judiciary Committee on Terrorist Acts Abroad* (May 31, 1989).

149. *Id.* ("Most countries do not have capital punishment, and several have constitutions, statutes, or policies prohibiting extradition of persons who might be subject to capital punishment in the requesting country.")

150. Treaty on Extradition Between the United States of America and Japan, March 3, 1978, U.S.—Japan, art. VI, para. 1, 31 U.S.T. 892, 897. Note also that the requesting nation may use the nationality theory of jurisdiction when appropri-

This language expressly prevents the "special use" of dual criminality from foiling otherwise valid extradition attempts as long as the nation has somehow proscribed the conduct, such as through the 1986 antiterrorism law.

2. *Alter the objective territoriality basis of jurisdiction by adding "Intent to Cause an Effect"*

One method to make extradition of unsuccessful drug conspirators and terrorists possible would be to alter the requirements of the objective territoriality principle by adding that any intent to cause a harmful effect upon the requesting nation would fulfill "special use" dual criminality obligations. This approach was adopted by a United States court in *Republic of France v. Moghadam*.¹⁵¹ There the court stated that "the court may assert jurisdiction over a defendant whose acts were done outside of the United States . . . [as long as] *the intent to cause a detrimental effect* [is] clear."¹⁵²

The biggest advantage of this approach would be the removal of a penalty for apprehending criminals prior to their successful act. Under the current approach, if conspirators are apprehended prior to the enactment of their scheme, there has been no detrimental effect in the requesting State, and therefore there can be no extradition under the traditional bases of jurisdiction. If an intent element is added, as long as the drug traffickers or terrorists intend to commit an act which would detrimentally affect the requesting State, the "special use" of dual criminality would not bar extradition if the perpetrators are caught prior to inflicting a harmful effect on the requesting State.

Blakesley offers an alternative resolution. He suggests that a hybrid theory be adopted which would allow extraterritorial jurisdiction to "be properly asserted if the offense charged meets all but one of the requirements of any two or more traditional bases of jurisdiction, even though it does not meet all the requirements of any single theory"¹⁵³ His approach is

ate.

151. 617 F. Supp. 777 (N.D. Cal. 1985). The court nevertheless determined that extradition in this case would be improper because no such showing of intent was made.

152. *Id.* at 787 (emphasis added) (citations omitted).

153. Blakesley, *supra* note 93, at 723.

problematic, however, because as noted, nations may not accept one of the traditional theories of jurisdiction, and even if they do, their conceptualization of the theory may differ from State to State. Therefore, a hybrid jurisdictional basis acceptable to the requesting nation may still be rejected by the requested nation under dual criminality's "special use."

It would be much easier to simply alter the theory most acceptable to all nations—the territorial theory—as suggested above.¹⁵⁴ If this alteration were limited to instances of common interest, such as international drug trafficking and terrorism, even those nations which currently do not accept the liberal objective territoriality theory in all instances may be persuaded to accept it in these limited, but important, circumstances.

V. CONCLUSION

The dual criminality requirement has served the purposes for which it was created—protection of individual rights. But when strictly interpreted, it has become a hindrance to achieving the policies underlying extradition itself, such as the suppression of international crimes of drug trafficking and terrorism. Because the prosecution of these crimes is in both the national and international interests, the dual criminality requirement should be relaxed.¹⁵⁵ However, the requirement should not be eliminated because the requirement does protect certain political interests of nations while preserving important rights of the accused.

Jonathan O. Hafen

154. BASSIOUNI, *supra* note 11, at 254 ("The theory of territorial jurisdiction [is] often referred to as the *territorial principle* because of its universal recognition This principle, more than any other, is a concomitant of sovereignty; and, therefore, all states adhere to the territorial principle.").

155. In addition to the comments throughout this paper supporting liberalization of the dual criminality requirement, see International Legal Notes: *Extradition and the Proper Scope of the Principle of Double Criminality*, 54 AUSTL. L.J. 240 (1980) (supporting a liberal reading of the dual criminality requirement).